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HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 429

SILVIO DE VITA,

Petitioner,

vs.

STATE OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY AND BRIEF IN SUPPORT THEREOF.

HARRY KAY,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 429

SILVIO DE VITA,

Petitioner,

vs.

STATE OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Silvio De Vita, respectfully shows:

I

Summary Statement of the Matter Involved

1. On March 8, 1952 petitioner was convicted of the crime of murder in the Essex County Court of the State of New Jersey. On March 12, 1952 petitioner was sentenced to suffer the punishment of death. Petitioner appealed the judgment of conviction directly to the Supreme Court of New

Jersey. On December 15, 1952 the Supreme Court of New Jersey affirmed the judgment of conviction (Mr. Justice Heher dissented). *State* v. *Grillo,* 11 N. J. 173, 92 A. (2d) 328 (1952). Petitioner applied to the Governor for a commutation of the death sentence to life imprisonment (R. S. 2A:167-1, *et seq.*) The application was denied. Petitioner sought a writ of certiorari from the Supreme Court of the United States. The execution of the sentence of death was stayed. The writ was denied June 8, 1953. (Mr. Justice Black and Mr. Justice Douglass being of the opinion the writ should be granted.) *De Vita* v. *State of New Jersey,* 345 U. S. 976, 73 S. Ct. 1123.

2. Petitioner instituted *habeas corpus* proceedings to test the jurisdiction of the court and the validity of the sentence in the Superior Court of New Jersey. A writ was allowed July 1, 1953 (R. S. 2A:67-14(c). At the hearing, July 15, 1953, the writ was discharged (27 N. J. Super. 101) (1953). Petitioner appealed to the Appellate Division of the Superior Court. The Appellate Division stayed the execution of the sentence of death. On October 9, 1953 the Supreme Court of New Jersey, on its own motion, certified the appeal directly to it for review (Order of Certification, p. 9 (this petition). On October 19, 1953 the Supreme Court of New Jersey affirmed the judgment. Mr. Justice Heher dissented. The majority and minority opinions are set forth in pp. 11-13 (this petition). The opinion of the lower court is set forth in R. pp. 26-34.

II

Jurisdictional Statement

1. The statutory jurisdiction believed to sustain the jurisdiction of this honorable court is 28 U. S. C. A., Sec. 453, 1257(3). Petitioner claims the infringement of a right, privilege or immunity accorded to petitioner by provisions of Art. 14, Sec. 1, amend. U. S. Constitution; Art. 1, Sec.

1, 10; Art. 6, Sec. 2, par. 3, N. J. Constitution 1947; New Jersey R. S. 2A.113-2, 4; Revised Rules of Practice of New Jersey 2:7-9 (a), (d).

2. The date of the judgment sought to be reviewed by certiorari is October 19, 1953, and the date of this application for certiorari is October 23rd, 1953.

3. The stage in the proceedings in the trial court and in the New Jersey Supreme Court to which, and the manner in which the federal questions sought to be reviewed were raised, are set forth in the summary statement of the matter involved and in the matter of the application of Silvio De Vita for a writ of *habeas corpus*, 27 N. J. Super. 101, and in the transcript of the entire record presented herewith. Therein petitioner claimed that, (a) the trial court lacked jurisdiction to impose the sentence of death upon the collective verdict of the jury and that the polled verdict of the jury was in total disregard of the statutes and rules in such case made and provided; (b) petitioner was denied due process of law; (c) petitioner was deprived of his substantial right to a fair and impartial jury; (d) the polled verdict of the jury was not that of the jury but that of the clerk and petitioner was entitled to a polled jury verdict; (e) the "so-called" jury verdict was not in accord to specific statutory enactment; (f) the imposition of sentence is contrary to law, the court exceeded its jurisdictional power to impose the sentence of death; (g) the warrant, commitment and detainer are void for lack of jurisdiction in the court to pronounce judgment and (h) petitioner is unlawfully detained by virtue of a void judgment.

4. The manner in which federal questions sought to be reviewed were passed upon by the Supreme Court of New Jersey is set forth in the opinions appended hereto (not yet officially reported).

II(a)

Specific Portions and Reference to the Record of the Matter Supporting the Claim That the Legislative and Constitutional Mandates Were Not Adhered to and Were of a Nature to Bring the Case Within the Statutory Jurisdictional Provision.

(a) "You will recall that I mentioned previously, we are in effect trying three cases in one and that each defendant is entitled separately to your consideration and verdict. Therefore the form of your verdict should be as follows: It being understood that your verdict as to each defendant, whatever it may be, shall be the unanimous verdict of the jury. We find the defendant Silvio De Vita guilty of murder in the first degree, or we find him guilty of murder in the first degree with a recommendation of life imprisonment, or we find him not guilty, as the case may be. Then as to Rosania, we find him guilty of murder in the first degree, or we find him guilty of murder in the first degre with a recommendation of life imprisonment, or we find him not guilty. As to Grillo, we find him guilty of murder in the first degree, or we find him guilty of murder in the first degree with a recommendation of life imprisonment, or we find him not guilty (R. p. 6)."

(b) "The Foreman: We, the jury, find the defendant Silvio De Vita guilty of murder in the first degree, the defendant Ralph Rosania guilty of murder in the first degree with a recommendation of life imprisonment, the defendant Joseph Grillo guilty of murder in the first degree (R. p. 7)."

(c) "By order of the court the jury is polled. Clerk: You have heard the verdict as rendered by your Foreman wherein you say defendant Silvio De Vita and Joseph Grillo are guilty of murder in the first degree. As the roll is called, you will answer by yes or no whether this is your verdict or not" (R. p. 8).

(d) Vito R. George.
Mr. George: Yes.
The Clerk: Earl G. Gieser.

Mr. Gieser: Yes.
The Clerk: George Hobby.
Mr. Hobby: Yes.
The Clerk: Ethel M. Grassle.
Miss Grassle: Yes.
The Clerk: Arthur Kuhnle.
Mr. Kuhnle: Yes.
The Clerk: Leonard L. Harmon.
Mr. Harmon: Yes.
The Clerk: Ralph M. Johnston, Jr.
Mr. Johnston: Yes.
The Clerk: Martha Garrabrant.
Mrs. Garrabrant: Yes.
The Clerk: Gerard Holzel.
Mr. Holzel: Yes.
The Clerk: Harold Leslie.
Mr. Leslie: Yes.
The Clerk: James A. Little.
Mr. Little: Yes.
The Clerk: William C. Gardner.
Mr. Gardner: Yes.

III

Statement of the Questions Presented

These proceedings present a substantial question under the federal and state constitutions, the statutes and rules of practice and procedure of New Jersey upon the issue: (a) Was due process and the essential elements of fundamental fairness observed at the trial? (b) Did the trial court exceed its jurisdictional capacity to pronounce the Supreme penalty? (c) Is the conviction, sentence and warrant of commitment, a nullity?

IV

Reasons Relied On for Allowance of Writ

The Supreme Court of New Jersey decided the substantial questions presented in the foregoing statement of ques-

tions not in accord with its own statutes, rules and decisions nor with the decisions of this court and other courts as set forth in the Table of Cases and statutes and including the cases of:

Anderson et al. v. *Penn Hall Co.*, 47 F. Supp. 691;
Bowen v. *Johnson*, 306 U. S. 19, 26-27;
In re: *Belt*, 159, U. S. 95;
In re: *Bonner*, 151 U. S. 242;
Blankenship v. *State*, 37 S. E. 732;
Hill, Warden v. *U. S., ex rel, Wampler*, 298 U. S. 460;
Heinze v. *State*, 42 A. (2d) 428;
Johnson v. *Zerbst*, 304 U. S. 458;
McCullough v. *State*, 73 S. E. 546;
Mattice v. *Md. Casualty Co.*, 5 F. (2d) 233;
People v. *Hicks*, 287 N. Y. 165;
People v. *Lopez*, 131 Pac. 104;
Ponder v. *State*, 74 S. E. 715;
R. S. 2A: 113-2,4;
Solar v. U. S., 86 A. (2d) 538;
Voight v. *Webb*, 47 F. Supp. 743.

V

Statement of the Ground Upon Which It Is Contended That the Questions Involved Are Substantial

1. The U. S. Constitution, amend. Art. 14, Sec. 1, states that,

> ". . . Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any persons within its jurisdiction the equal protection of the laws."

and New Jersey Constitution (1947), Art. 1, provides,

> "All persons . . . have certain natural and unalienable rights among which are those of enjoying and defending life and liberty . . .";

and Art. 10,

> "In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury . . ."

and Revised Statutes 2A:113-2,

> "A jury finding a person guilty of murder shall designate by their verdict whether it be murder in the first degree or in the second degree."

and R. S. 2A:113-4,

> "Every person convicted of murder in the first degree . . . shall suffer death . . . unless the jury shall by its verdict and as part thereof . . . recommend life imprisonment in which case this and no greater punishment shall be imposed," and

Rules of Practice and Procedure, 2:7-9 (a), (d),

> "The verdict shall be unanimous. It shall be returned by the jury to the Judge in open court," and (d) "When a verdict is returned and before it is recorded, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged",

a judicial inquiry is required to determine whether there was any deprivation or abridgment thereof constituting a denial of the essentials of due process, of the right to trial by jury and fundamental fairness.

VI

Certified Transcript of the Record

Petitioner presents to this court and files herewith as an exhibit hereto a duly certified transcript of the entire record in the case as the same appears in the New Jersey Supreme Court.

Wherefore, your petitioner prays that a writ of certiorari issue to the Supreme Court of the State of New Jersey to the end that the errors aforesaid may be corrected by this honorable court.

Harry Kay,
Counsel for Petitioner.

SUPREME COURT OF NEW JERSEY

SEPTEMBER TERM, 1953

No. 1396

Civil Action on Certification

In the Matter of The Application of Silvio De Vita for Writ of Habeas Corpus

---

SILVIO DE VITA,

Plaintiff-Appellant,

vs.

STATE OF NEW JERSEY,

Defendant-Respondent.

Order of Certification

Pursuant to Rule 1:5-1 it is ordered that the appeal from the judgment entered in this cause on July 15, 1953, in the Superior Court, Law Division, now pending in the Superior Court, Appellate Division, be certified directly to this Court, to the end that it may be reviewed by this Court; and it is further

Ordered that this cause shall be deemed pending on appeal in this Court, and that further proceedings herein shall be had in the same manner as provided for on appeals

as of right, in accordance with the rules of this Court; and it is further

Ordered that all papers necessary to be filed in the cause by the parties hereto in the prosecution of this appeal, down to and including the issuing of mandate, shall be filed by the Clerk of this Court without the payment to him of fees for such filing.

Dated October 9th, 1953.

By the Court.

ARTHUR T. VANDERBILT,
Chief Justice.

Filed: Oct. 9, 1953, John H. Gildea, Clerk.

SUPREME COURT OF NEW JERSEY

SEPTEMBER TERM, 1953

No. A-28

In the Matter of the Application of Silvio De Vita for a Writ of Habeas Corpus

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Majority Opinion

Argued October 13, 1953—Decided October 19, 1953

On appeal from a judgment of the Superior Court, Law Division, whose opinion is reported at 27 *N. J. Super.* 101.

Mr. Harry Kay argued the cause for the appellant.

Mr. Edward Gaulkin argued the cause for the respondent, (*Mr. C. William Caruso,* of counsel).

PER CURIAM.

The judgment is affirmed for the reasons expressed in the opinion of Judge Naughright in the Superior Court, Law Division.

Filed: Oct. 19, 1953. John H. Gildea, Clerk.

SUPREME COURT OF NEW JERSEY

SEPTEMBER TERM, 1953

No. A-28

In the Matter of the Application of Silvio De Vita for Writ of Habeas Corpus

---

SILVIO DE VITA,
Plaintiff-Appellant,

vs.

STATE OF NEW JERSEY,
Defendant-Respondent

Minority Opinion

HEHER, *J.*, dissenting.

I would reverse the judgment for the reasons given in my dissent on the prior affirmance of the judgment in this cause. *State* v. *Grillo,* 11 *N. J.* 173 (1952).

SUPREME COURT OF NEW JERSEY

Appeal Docket No. 1396

Criminal Action on Appeal

In the Matter of the Application of Silvio De Vita for Writ of Habeas Corpus

---

SILVIO DE VITA,

Plaintiff-Appellant,

vs.

STATE OF NEW JERSEY,

Defendant-Respondent

Mandate on Affirmance

This cause having been duly argued before this Court by Mr. Harry Kay, counsel for the appellant and Mr. Edward Gaulkin, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Law Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Law Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton on the 19th day of October, 1953.

JOHN H. GILDEA,
Clerk of the Supreme Court.

Filed: Oct. 19, 1953, John H. Gildea, Clerk.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

Docket No. 429

SILVIO DE VITA,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of the Court Below

The opinion of the trial court is recorded in 27 N. J. Super. 101 (R. p. 26-27). The opinions of the New Jersey Supreme Court are reported in *State* v. *Grillo, State* v. *De Vita, Grillo and Rosania,* 11 N. J. 173, 92 A. (2d) 328, 345 U. S. 976, 73 S. Ct. 1123 and the opinions of the New Jersey Supreme Court dated October 19, 1953 are set forth at length (R. p. —).

II

Jurisdictional Statement

1. The date of the judgment sought to be reviewed by certiorari is October 19, 1953, and the date of this application for certiorari is October 23, 1953.

2. The statutory provision which petitioner believes sustains the jurisdiction of this honorable court is Title 28 U. S. C. A., Sec. 453, 1257 (3).

3. The nature of the case, the rulings below, and statements of facts and references thereto in the record to bring this case within the jurisdictional provision relied on have been set forth and are stated in the preceding petition for review by certiorari under I (p. 1), which are hereby adopted and made a part of this brief.

4. The cases believed to sustain said jurisdiction are as follows:

Anderson et al. v. *Penn Hall Co.*, 47 F. Supp. 691;
Bowen v. *Johnson*, 306 U. S. 19, 26-27;
In re: *Belt*, 159 U. S. 95;
In re: *Blankenship* v. *State*, 37 S. E. 732;
Hill, Warden v. *U.S., ex rel., Wampler*, 298 U. S. 460;
Heinze v. *State*, 42 A. (2d) 428;
Johnson v. *Zerbst*, 304 U. S. 458;
McCullough v. *State*, 73 S. E. 546;
Mattice v. *Md. Casualty Co.*, 5 F. (2d) 233;
People v. *Hicks*, 287 N. Y. 165;
People v. *Lopez*, 131 Pac. 104;
Ponder v. *State*, 74 S. E. 715;
R. S. 2A:113-2, 4;
Solar v. *U. S.*, 86 A. (2d) 538;
Voight v. *Webb*, 47 F. Supp. 743;

III

Statement of the Case

This has already been stated in the preceding petition for review by certiorari under I (p. 1) of said petition, which is hereby adopted and made a part of this brief.

IV

Specification of Errors

The Supreme Court of the State of New Jersey erred in affirming the judgment of the trial court for the reasons expressed in the opinion of the trial court, in that,

(a) Upon the "so-called" verdict the trial court lacked jurisdiction to pronounce the sentence of death;

(b) The conviction, sentence and warrant of commitment are a nullity and De Vita is illegally confined;

(c) De Vita was denied due process of law.

V

ARGUMENT

Summary of Argument

POINT 1. A verdict of the jury should be so certain as to leave no room for mistake, vagueness, obscurity or inescapable doubt.

POINT 2. The Clerk of the court should not invade the province of the jury nor usurp the jury's function to resolve the issue.

POINT 3. A finding of guilty by a jury has no legal consequence unless it is embodied in a proper verdict.

POINT 4. The pronouncement of a death sentence upon such a verdict or verdicts is unwarranted and an invasion of the constitutional rights, privileges and liberties of De Vita.

POINT 5. No one should go to his death under an unlawful sentence for failure to raise a point or resort to Appellate procedure. The writ of habeas corpus is never too late to save a forfeiture.

ARGUMENT

Point 1

A verdict of the jury should be so certain as to leave no room for mistake, vagueness, obscurity or inescapable doubt.

What was the collective finding of the jury? An examination of the mimeographed transcript page 1720 submitted to the New Jersey Supreme Court, of which the court may take judicial notice, and of Exhibit P-1 in the transcript of these proceedings, indicates the verdict:

> The Foreman: We, the jury, find the defendant Silvio De Vita guilty of murder in the first degree, the defendant Ralph Rosania guilty of murder in the first degree with a recommendation of life imprisonment, the defendant Joseph Grillo guilty of murder in the first degree.

Let us compare this verdict with the verdict in the matter of State v. Merra, 103 L. 361. In that case, the verdict as originally recorded was as follows:

> "We find the defendant Salvatore Merra guilty of murder in the first degree and defendant Salvatore Ranelli guilty of murder in the first degree and recommend life imprisonment at hard labor."

By the return to the writ of error, the record was certified to by the trial judge as correct. By the return in the mimeographed transcript of the record before the New Jersey Supreme Court, it was certified to on March 8, 1952 by the four official court reporters as being correct.

In the Merra case, it appears, that after the verdict was rendered the jury was polled and each juror said,

> I find the defendant Salvatore Merra guilty of murder in the first degree and defendant Salvatore Ranelli

guilty of murder in the first degree, and recommend life imprisonment.

(Note: The proper manner to poll a jury. Each juror makes his individual finding, public, in open court.)

Mr. Justice Kalisch and Mr. Justice Campbell of the Court of Errors and Appeals voting to reverse in the Merra case stated:

"Of course, the clerk in recording the verdict was not authorized to put in either periods or commas and therefore the verdict must be read in its general sense gathered from the language used, and not twisted from its original meaning by punctuation."

Upon a rule issued by the Court of Errors to the trial judge to certify what the verdict was, the judge certified the verdict to be:

"We find Salvatore Merra guilty of murder in the first degree. We find Salvatore Ranelli guilty of murder in the first degree and recommend life imprisonment."

And these learned Justices further say,

"So, by the art of punctuation, it is attempted to make it appear now that Salvatore Merra was excluded from the recommendation of life imprisonment * * * it is quite obvious that if the order of the names as appears in the verdict had been reversed, that is, instead of Merra's name being first, it had been last mentioned in the verdict, and if Ranelli's name had been first instead of last mentioned therein, the same argument would obtain; namely, that the recommendation of life imprisonment was intended for Merra and not for Ranelli. The logical sequence of this situation is that the order in which the names of the accused appear in the verdict determines the facts as to whom the recommendation of life imprisonment is to be applied.

> This to me seems to be preposterous. I am unwilling to consign a human being to death on any such hair-splitting refinement * * * The recommendation of life imprisonment, coming after the statement of finding these defendants guilty of murder in the first degree carries with it a recommendation of life imprisonment for both. I am unwilling to guess at what the intention of the jury was in delivering the verdict as it did. If it was intended to make a difference in the punishment to be inflicted on the defendants, the verdict, as given, does not express such intention and if there be a doubt as to what was intended by the verdict, that doubt must be resolved in *favorem vitae*. Therefor my vote is for reversal of the judgment to the end that the record be remitted to the trial court and that a judgment of life imprisonment be imposed upon the plaintiff, Merra."

That, which was said by Mr. Justice Kalisch, joined in by Mr. Justice Campbell, can equally be said of the verdict in the *De Vita* case. Both verdicts being substantially identical in meaning. The judgment was affirmed in the *Merra* case, but there were other reasons for the affirmance; in that, the Court of Errors stated:

> * * * The verdict was clearly understood as expressing the purpose as that construction indicates is made manifest not only by the conduct of the trial court in pronouncing sentence of death upon Merra, but also by the conduct of the latter's counsel in sitting by and allowing such a sentence to be imposed without protest.

Such reasons to take life are no longer valid legal reasons, *re: State* v. *Cleveland*, 6 N. J. 316; *re: State* v. *Cooper*, 2 N. J. 540, wherein it was stated:

> "As to the suggestion that relief be withheld because counsel sat by and allowed the court to impose a sentence of death upon the defendant without the slightest indication of protest, this seems to have been pointedly disposed of in State v. Cooper, *supra* * * * the failure

> of the accused at the time of sentence to cover the sufficiency of the verdict by motion and arrest of judgment or otherwise would not serve to confer upon the judge jurisdiction to impose the extreme penalty as for murder in the first degree."

The majority (13) of the justices in the Merra case permitted the trial court to certify to it the record by amending the verdict as to a matter of fact. Of course, this, too, was clearly erroneous. Where an amendment of a verdict affects the life or death of an accused, such an amendment is not as to the form but as to substance. A verdict cannot be amended in substance. But on the whole, the dissenting opinion by Mr. Justice Kalisch and Mr. Justice Campbell agrees with De Vita that the jury intended the recommendation of life imprisonment to be applicable to De Vita as well as to Rosania. Had the jury intended otherwise it could have found a verdict in this form:

> We find the defendant Ralph Rosania guilty of murder in the first degree with a recommendation of life imprisonment. We find the defendant Silvio De Vita guilty of murder in the first degree. We find the defendant Joseph Grillo guilty of murder in the first degree.

There was doubt as to the verdict, for the court of its own motion directed the clerk to poll the jury on the verdict of only these two defendants. A finding of guilty by a jury has no legal consequence unless it is embodied in a proper verdict. The finding must be specific and in exact accord to the statutory mandate, (R.S.2:138-2, 4 now superseded 2A:113-2,4). The verdict as to both guilt and punishment is indivisible. The verdict must be so explicit that nothing written or said is required to supplement the meaning or add dignity to the judicial process. Upon this verdict, the court could not impose a capital sentence. To send one to

eternity, the finding must be in language clear and comprehensive. The pronouncement of the sentence of death upon such a verdict is unwarranted and without due process of law and is an invasion of the constitutional rights, privileges and liberties of De Vita (U. S. Constitution, Amendment 14, Sec. 1, "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws"). and (Constitution of New Jersey, Art. 1, Sec. 1, "Of enjoying and defending life and liberty", and Sec. 10, "In all criminal prosecutions, the accused shall have the right to a speedy and public trial by an impartial jury.").

Mr. Justice Heher, speaking for the court *in re: State* v. *Weber*, 127 L. 274, said:

> "The verdict is the definitive answer of the jury concerning the matters of fact committed to them for determination. And first principles dictate that it be sufficiently certain and specific to identify the crime and be responsive to the issue raised by the indictment and the plea. If the language employed by such as to engender a reasonable doubt as to whether the accused has been convicted of the offense pleaded in the indictment, the verdict is insufficient. Thus it is that the judgment under review is tainted with prejudicial error in matter of substance and must be reversed." We take occasion to reiterate the observation of Mr. Justice Swaze for our court of last resort: "Desirable as it is to punish crime, it is still more important to administer justice according to law; when this is once abandoned, we are adrift without chart or compass".

The collective finding of the jury is that the recommendation of life imprisonment be to the youth De Vita as well as Rosania. Mr. Justice Wachenfeld speaking for the court *in re: State* v. *Auld*, 2 N. J. 426, aptly said:

> "It is not pleasant to think of the taking of a life except in the precise mode prescribed by law • • •

> In a capital case one of the basic rights of the accused is to have a public trial in which his right of personal presence is recognized and maintained and in which the best judicial procedure is rigidly and jealously enforced. It does not suffice to say that although admittedly the essentials of the trial procedure were not adhered to, no injury or harm befell the prisoner."

While the facts, in the *Auld* case are different, such judicial expression can equally be applied to De Vita. The same standard of care must be exercised to see to it that all doubt is resolved in favor of De Vita. As the record now appears, there seems to be not one verdict, but several verdicts. Which one shall we accept? To take a life or to save a life?

POINT 2

The clerk of the court should not invade the province of the jury nor usurp the jury's function to resolve the issue.

Was the jury properly polled?

The right to poll the jury is as sacred as the right to have a jury. The right to a "poll" secures to one the right to a proper poll. The right to poll is founded on the constitutional guaranty, that no person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court.

The record shows the court of its own motion directing the Clerk to poll the jury on the verdicts of defendant Grillo and De Vita. Two rules are applicable, Rule 2:7-9(d), "When a verdict is returned and before it is recorded, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged:" and, Rule 2:7-9(a), "The verdict shall be unanimous. It shall be returned by the jury to the judge in open court."

De Vita was entitled to a poll of the jury on the entire verdict, not on the verdict of Grillo and De Vita, Rosania and Grillo, to determine whether the jury's verdict was responsive to the court's charge. The jury's function to resolve the issue and, particularly, the verdict, could not be restricted or limited and the clerk of the court could not invade the province of the jury nor usurp this function. Let us examine the Exhibit:

> "By order of the court the jury is polled. You have heard the verdict as rendered by your foreman, wherein you say the defendant Silvio De Vita and Joseph Grillo are guilty of murder in the first degree. As the roll is called you will answer by a yes or no answer whether this is your verdict or not."

Is this a proper question or is it a statement? Is it a multiple question? Can any juror answer yes or no or otherwise to such a question? Assuming a juror is in disagreement, he is directed to answer yes or no, no other answer. The compelled answer of each juror to a multiple question or statement in the affirmative or negative is not such a verdict of a jury or the verdict of a juror as is intended by the statute. The jury and not the clerk must adjudge the degree of guilt and the character of the punishment. The finding is the jury's and not the Clerk's. The Exhibit further indicates that each juror answered yes to this joint, collective multiple exhibit. The "so-called" verdict of the jury imposed upon it by the clerk is not a finding nor a verdict whatsoever. The answer of each juror must be complete, and each juror must state for himself his finding as required by R.S.2A:113-4; to allow otherwise, is to impair the basic right to trial by jury guaranteed under the federal and state constitutions.

In re: Anderson, et al. v. *Penn Hall Co.*, 47 F. Supp. 691, it is stated that:

"It is well settled, that the only verdict is that which the jury announces orally in court and which is received and recorded at the direction of the court as the finding of the jury."

In re: Bruce v. *Chestnut Farms—Chevy-Chase Dairy,* 126 F. (2d) 224, in civil practice, it is stated:

"The correct practice, when a poll of the jury is asked, is for the clerk to call the roll and ask each juror, as his name is called, to answer—for the plaintiff or for defendant; and if the responses of the individual jurors are not in complete agreement, the jury should be required to retire and give further consideration to the case."

In re: Ponder v. *State,* 74 S. E. 715, it is stated that:

"Under our law, no one can be deprived of his life, liberty or property except upon the unanimous verdict of the jury empaneled to pass upon the issue."

In re: People v. *Lopez* 131 Pac. 104, it was conceded, as claimed by counsel, that the proper manner of poll, is to have each juror called and required to state his verdict in his own language and without reference to the form of the verdict returned by the jury, or in lieu thereof, that the verdict should have been read to each of the jurors separately, then asked, "Is this your verdict?"

In re: McCullough v. *State,* 73 S. E. 546, the court said:

"The law of this state places a high value in criminal cases upon the right of the accused to poll the jury. In civil cases, the right is discretionary with the presiding judge, but in criminal cases polling is not a privilege to be granted at the discretion of the judge, but is a legal right and it has always been held to be material and reversal error to refuse the free exercise of this right."

Also, when the court directed the clerk to poll the jury, the poll should have been of the entire verdict, not of any separate part thereof.

In re: Stern, 11 N. J. 584, Mr. Justice Heher, speaking for the court stated:

> "It is of the very essence of the right of trial by jury that the verdict be free and untrammeled. The verdict of the jury "should not be the general average of the views of its individual members, but the consensus of individual judgment;" every juror "takes an oath that is individual and that puts upon him as an individual the responsibility of correctly determining the matter submitted." Jurymen "act as individuals and they must decide a case upon their own opinion and their own judgment and not merely acquiesce in the conclusion of others. A verdict that does not rest upon the convinced understanding of the individual jurors can have no sanction."

In re: State v. *Cleveland,* 6 N. J. 316, it was claimed that the verdict of the jury was a nullity. Mr. Justice Wachenfeld speaking for the court stated:

> "The chronological sequence of events upon the jury's return, as shown by the record, is as follows:
>
> "The Clerk: Ladies and Gentlemen of the jury, have you agreed upon a verdict?
>
> Jurors: Yes.
>
> The Clerk: Mr. Foreman, how do you find?
>
> The Foreman: We the jury find the defendant, James Cleveland, guilty of murder in the first degree.
>
> Mr. Kushner: I respectfully request on behalf of the defendant that the jury be polled.
>
> The Court: All right, poll the jury.
>
> The Clerk: Hiller Geneslaw, how do you find?
>
> The Foreman: Guilty.
>
> The Clerk: Selvie U. Dulow, how do you find?
>
> Juror No. 2: Guilty.
>
> The Clerk: Lina A. Burke, how do you find?

Juror No. 3: Guilty.
The Clerk: Edward T. Sturm, how do you find?
Juror No. 4: Guilty.
The Clerk: Elwain P. Hitchcock, how do you find?
Juror No. 5: Guilty.
The Clerk: Edward H. Heintjes, how do you find?
Juror No. 6: Guilty.
The Clerk: Ethel F. Baynes, how do you find?
Juror No. 7: Guilty.
The Clerk: Irving Jacobus Grieves, how do you find?
Juror No. 8: Guilty.
The Clerk: Eleanor Horka, how do you find?
Juror No. 9: Guilty.
The Clerk: William H. Brophy, how do you find?
Juror No. 10: Guilty.
The Clerk: Dorothy M. Struyk, how do you find?
Juror No. 11: Guilty.
The Clerk: Thomas Schiffanella, how do you find?
Juror No. 12: Guilty.
The Clerk: Ladies and Gentlemen of the jury, hear your verdict recorded: You say you find the defendant guilty of murder in the first degree, as rendered by your Foreman, and so say you all.

It will be noted in the Cleveland case that the Clerk asked each juror the question, "How do you find?" The Clerk did not superimpose the collective finding upon each juror, nor did the Clerk state to the jury, "You have heard the verdict as rendered by your foreman wherein you say * * * As the roll is called you will answer by a yes or no answer whether this is your verdict or not."

Mr. Justice Wachenfeld in the *Cleveland* case further stated:

> "The statute controlling is R. S. 2:138-2 (superseded 2A:113-2) * * * and the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, designate by their verdict whether it be murder in the first degree or in the second degree.

Rule 2:7-9(a) provides the verdict shall be unanimous and shall be returned by the jury to the judge in open court, while section (d) of the same rule reads:

> "When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If, upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged."

The polling of the jury is a procedure whereby the jurors are asked individually the finding they have arrived at, as denoted by the question posed by the clerk: "* * * how do you find?" The practice of long standing requires each juror to answer for himself, thus creating individual responsibility eliminating any uncertainty as to the verdict as announced by the foreman.

True, here the foreman of the jury, when first inquired of, said: "We the jury find the defendant, James Cleveland, guilty of murder in the first degree." Likewise the clerk recited the stated formula after the jury was polled. Admittedly, however, when individual answers were given, each juror, including the foreman, replied "Guilty" but did not specify the degree of murder which the defendant was guilty of.

The State argues thusly:

> "There was no dissent by any member of the jury at any time, nor did the defendant's counsel, even though it was not legally essential, make any objection or protest."

We know of no authority creating an inference because a juryman fails to dissent, nor are we cognizant of any practice which makes his failure to dissent or mere silence the equivalent of a full finding as proclaimed by the statute.

We see little merit in the State's intimation that "it was clear what verdict the jury intended to render and no other inference could be drawn than that the de-

fendant was guilty of murder in the first degree as prescribed by the statute."

As to the suggestion that relief be withheld because counsel "sat by and allowed the court to impose a sentence of death upon the defendant without the slightest indication of protest," this seems to have been pointedly disposed of in State v. Cooper, *supra:*

> "* * * the failure of the accused, at the time of sentence, to question the sufficiency of the verdict, by motion in arrest of judgment or otherwise, did not serve to confer upon the judge jurisdiction to impose the extreme penalty as for murder in the first degree.

Before the verdict was recorded, a poll of the jury was demanded and each juror responded "Guilty" without specifying the degree of murder. On conclusion of the poll, the clerk of the court called upon them to hearken to the verdict as the court has recorded it, saying: "Your foreman saith that Jason Williams, the prisoner at the bar, is guilty of murder in the first degree, and so say you all." The sufficiency of this finding was the sole issue on appeal, which resulted in a reversal of the judgment of conviction and the awarding of a new trial. The Court of Appeals said:

> "The prisoner was entitled, as a matter of right, to a poll of the jury, and he could not be convicted, except upon the concurrence of each juror. Upon the poll, it was the duty of each juror to say for himself, whether he found the prisoner guilty of murder in the first of second degree. We all know that jurors sometimes, upon the poll, dissent from the verdict declared for them by their foreman, and it is for the purposes of compelling each juror to declare his own verdict, in his own language, that a poll of the panel is allowed. Upon the poll in this case, there was not a single juror who, in finding the prisoner guilty, ascertained the degree of murder as required by the Code. On the contrary, the verdict was 'guilty,' and

such a verdict is, as we have said, on an indictment for murder, a nullity."

The question involves more than a technical violation of a statute or rule of procedure. It is a matter "of utmost gravity" as it adjudicates not alone the guilt of the defendant but carries with it the punishment of death. Such a determination cannot be left to inference. The finding must be specific and in exact accord with the statutory mandate.

We think the law clearly demands that when a jury in a murder case is polled, each juror, if he finds the defendant guilty, shall designate by his verdict whether it be murder in the first degree or in the second degree.

This was not done in the case under consideration and we think it constituted prejudicial and therefore reversible error."

In the *De Vita* case, each juror in answering the multiple, limited statement concerning the two defendants, propounded by the Clerk, answered the word ,"Yes". Is such a finding, the finding required by our statute, wherein each juror must designate by their verdict whether it be murder in the first degree or in the second degree? I think not.

In re: State v. *Myers*, 7 N. J. 465, the defendant cited as error, the manner in which the jury was polled. In said case, after the foreman had announced the verdict as murder in the first degree with a recommendation of life imprisonment, the clerk of the court repeated this finding to each juror individually and asked him, if that was his verdict. The jurors replied variously: "Yes." "Yes, sir." "It is." The clerk thereafter repeated the verdict as announced.

In De Vita's matter, the clerk of the court did not repeat this finding to each juror individually nor did the clerk of the court ask each juror individually if that was his verdict. As indicated heretofore, the clerk stated, "You have heard the verdict as rendered by your foreman

wherein you say defendant Silvio De Vita and Joseph Grillo are guilty of murder in the first degree. As the roll is called you will answer by a yes or no answer whether this is your verdict or not."

There is a substantial difference in the manner of the poll in *State* v. *De Vita* and in *State* v. *Myers*. Such difference vitiates a jury trial and must be resolved in favor of life.

In the *Myers* case, Mr. Justice Wachenfeld, speaking for the court, stated:

> "Each juror announced his finding of the defendant's guilt and specified the degree of murder. The right to a poll of the jury set forth in R. S. 2:138-2 and Rule 2:7-9(d) was fully satisfied."

In re: State v. *Foulds*, 127 L. 336, speaking for the Court of Errors & Appeals, Chief Justice Brogan stated:

> "The court thereafter directed the Clerk to ask the foreman again what the verdict of the jury was.
> "Mr. Foreman: How say you?"
>
> And the foreman replied:
>
> "I find the defendant guilty of murder in the first degree."
>
> The court directed the clerk to poll the balance of the jury in compliance with the request therefor. The clerk thereupon called each juror and each in turn answered:
>
> "Guilty of murder in the first degree," at the end of which the clerk added an additional question:
>
> "And so say you all?"
>
> Therefore the jury replied:
>
> "We do."
>
> The jury by their foreman's statement, by the poll of each juror separately and by their announcement

in common, found the defendant guilty of murder in the first degree."

In re: State v. *Thursby,* 245 S. W. 859, the record shows that, upon the return of the verdict by the jury, defendant's counsel requested of the trial court and the trial court acted as follows:

> Mr. Hill: I would like to have the jury polled, your Honor."
> The Court: Is this, ladies and gentlemen, your verdict in this case?
> Jurors: Yes, it is.

The Appellate Court in review of this poll, stated:

> Apparently the trial judge did not ask of each juror individually if the juror had concurred in or had assented to the verdict. A litigant has the right to request and it is error to refuse a litigant's request to a poll of the jury. In polling a jury, each juror should be questioned individually, so that he may by his answer clearly say that he did or did not concur in the verdict as returned."

In re: 23 C. J. S., Sec. 1392(c), p. 1071, concerning the manner of polling a jury, it is stated:

> "In polling the jurors it is not sufficient to question them collectively whether they have agreed to the verdict, although each and all expressed assent thereto, but each juror should be questioned individually and separately since the object of a poll is to call on each juror to answer for himself and in his own language."

In re: Blankenship v. *State,* 37 S. E. 732, it was stated

> "In criminal cases the privilege of polling a jury is a legal right in the defendant and does not depend on the discretion of the court. In the first place, there can be no question that to poll a jury is to question the

jurors individually and one at a time. The very word 'poll' is inconsistent with any other idea. The right to have the jury polled is given the accused in order that he may ascertain whether each and every one of the jurors concurs in the verdict returned. The law allows him to have this done by calling the jurors *seriatim*, and propounding to each the proper questions. Each juror should be put to the individual test and made to respond solus, without assistance and without accompaniment."

In re: Solar v. *U. S.*, 86 A. (2d) 538, the court stated:

"It is well established that the result of polling a jury is to eliminate the previously proferred verdict and substitute therefore the individual verdict of each juror. A verdict must be unanimous. This requirement of unanimity extends to all issues which are left to the jury. A verdict embodies in a single finding the conclusions by the jury upon all questions submitted to it. Until all twelve jurors have unanimously agreed, on every part of the verdict, there is no valid verdict."

In re: 64 *Corpus Juris, Sec.* 861, p. 1059, it is stated:

"Polling the jury is a practice whereby the jurors are asked individually whether they have assented and still assent to the verdict. To poll a jury is to call the names of the persons who compose a jury and require each juror to declare what his verdict is before it is recorded. The object of polling the jury is to give each juror an opportunity to declare his present judgment in open court."

In re: Heinze v. *State,* 42 A. (2d) 428, it is reported that:

Counsel for the defendants then requested that the jury be polled and thereupon every juror announced the verdict. It is a fundamental principle that the verdict of the jury in a criminal case has no effect in

law until it is recorded and finally accepted by the court. Where the verdict is ambiguous, inconsistent, unresponsive or otherwise defective, it is the duty of the trial judge to call the jury's attention to the defect and to direct them to put the verdict in proper form, either in the presence of the court or by returning to their consultation rooms for the purpose of further deliberation * * * When a jury is polled, each juror is called by name and asked the question whether the verdict as delivered by the foreman is his verdict * * * each juror is call on to answer for himself in his own language.

In re: State v. *Vaszorich, et al.*, 76 N. J. L. J. 226, it was contended that the jury verdict against each defendant was fatally defective under the principle expressed in *State* v. *Turco*, 98 N. J. L. 61; *State* v. *Cooper*, 2 N. J. 540; *State* v. *Cleveland*, 6 N. J. 316; and *State* v. *Greely*, 11 N. J. 485. The return of the three verdicts in that case was as follows:

"The Clerk: Jurors, look upon the prisoner, Vaszorich, Ladies and gentlemen of the jury, have you agreed upon your verdict?

"The Forelady: We have.

"The Clerk: Who speaks for you, your forelady? Madam Forelady, do you find the defendant Vaszorich guilty in the manner and form as he stands charged in the indictment, or not?

"The Forelady: We find the defendant, John Louis Vaszorich, guilty of first degree murder, with no recommendation.

"The Court: The verdict as rendered by the forewoman may be recorded.

"Mr. Juska: Will your Honor poll them now, or after you have heard them all?

"The Court: Yes. As your individual names are called as to the defendant Vaszorich, will you be kind enough to render your own individual verdict? Your verdict has been recorded.

"Forelady: That's right.

"The Court: And you have stated it.

"The Forelady: That's right.

"The Court: Very well. Continue with the poll.

"The Clerk: Gladys E. Kahle, how say your individually as to the defendant Vaszorich?

"The Forelady: Guilty of first degree murder, with no recommendations.

"The Clerk: Robert E. Hill, how say you individually with reference to the defendant Vaszorich?

"Juror #2: Guilty of first degree murder, without recommendation.

"The Clerk: Axel E. Palm, how say you individually with respect to the defendant Vaszorich?

"Juror #3: Guilty of first degree murder, without recommendation.

"The Clerk: Bessie L. McIntyre, how say you individually with reference to the defendant Vaszorich?

"Juror #4: Guilty of murder, with no recommendation for mercy.

"The Clerk: Jane P. Cottrell, how say you as to the defendant, Vaszorich?

"Juror #5: Guilty of murder in the first degree, with no recommendation.

"The Clerk: Clarence R. Martin, how say you individually with respect to the defendant Vaszorich?

"Juror #6: Guilty of murder in the first degree with no recommendations.

"The Clerk: Marjorie L. Keilt, how say you individually with reference to the defendant Vaszorich?

"Juror #7: Guilty, with no recommendation.

"The Clerk: May Gilmour, how say you individually with reference to the defendant Vaszorich?

"Juror #8: Guilty in the first degree, without recommendation.

"The Clerk: Thomas J. Callahan, how say you individually with reference to the defendant Vaszorich?

"Juror #9: Guilty of first degree murder, no recommendation.

"The Clerk: George F. Simpson, how say you individually with reference to the defendant Vaszorich?

"Juror #10: Guilty of first degree murder, without recommendation.

"The Clerk: Charles D. Greene, how say you individually with reference to the defendant Vaszorich?

"Juror #11: Guilty, no recommendations.

"The Clerk: John V. Hart, how say you individually with reference to the defendant Vaszorich?

"Juror #12: Guilty of first degree murder, with no recommendations.

"The Court: The verdict that has been rendered by each individual juror may be recorded.

"The Clerk: Hearken to your verdict as the Court has ordered it recorded. You say you find a unanimous verdict of guilty against the defendant Vaszorich of murder in the first degree, with no recommendation, and so say you all.

"The Court: Proceed.

"The Clerk: Jurors, look upon the prisoner Brown. Members of the jury, who speaks for you, your forelady? Madam Forelady, how say you with reference to your verdict as to defendant Brown, guilty or not guilty in the manner as he stands charged in the indictment?

"The Forelady: We find the defendant George Eugene Christian Brown guilty of first degree murder, with recommendations of life imprisonment.

"The Court: Do you wish the jury polled, Mr. O'Hagan?

"Mr. O'Hagan: Yes, if your Honor please.

The Court: Very well. You will render your own, individual verdicts as to the defendant Brown.

"The Clerk: Gladys E. Kahle, how say you individually as to the defendant Brown?

"The Forelady: Guilty of first degree murder, with recommendations of life imprisonment.

"The Clerk: Robert E. Hill, how say you individually with reference to the defendant Brown?

"Juror #2: Guilty of first degree murder, with recommendation for life imprisonment.

"The Clerk: Axel E. Palm, how say you individually with reference to defendant Brown?

"Juror #3: Guilty of first degree murder with recommendation for life imprisonment.

"The Clerk: Bessie L. McIntyre, how say you individually with reference to the defendant Brown?

"Juror #4: Guilty of first degree murder, with recommendation for life imprisonment.

"The Clerk: Jane P. Cottrell, how say you individually with reference to defendant Brown?

"Juror No. 5: Guilty of first degree murder, with recommendation for life imprisonment.

"The Clerk: Clarence R. Martin, how say you individually with reference to defendant Brown?

"Juror #6: Guilty of murder in the first degree, with recommendations.

"The Clerk: Marjorie L. Keilt, how say you individually with reference to the defendant Brown?

"Juror #7: Guilty, with recommendation.

"The Court: Recommendation of what?

"Juror #7: Life imprisonment.

"The Court: Very well.

"The Clerk: May Gilmour, how say you individually with reference to the defendant Brown?

"Juror #8: Guilty, with recommendations of life imprisonment.

"The Clerk: Thomas J. Callahan, how say you individually with reference to defendant Brown?

"Juror #9: Guilty, with recommendation of life imprisonment.

"The Clerk: George F. Simpson, how say you individually with reference to defendant Brown?

"Juror #10: Guilty, with recommendation for life imprisonment.

"The Clerk: George F. Simpson, how say you individually with reference to defendant Brown— Or Charles D. Greene, how say you individually with reference to defendant Brown?

"Juror #11: Guilty, with recommendations to life imprisonment.

"The Clerk: John V. Hart, how say you individually with reference to defendant Brown?

"Juror #12: Guilty of murder, with recommendation of life imprisonment.

"The Court: Very well. The verdict as rendered by the individual jurors as to the defendant Brown may be recorded.

"The Clerk: Hearken to your verdict as the Court has ordered it recorded. You say you find a unanimous verdict of guilty against Brown of murder in the first degree with a recommendation for life imprisonment, and so say you all.

"The Court: You may proceed as to the defendant, Berry.

"The Clerk: Jurors, look up the prisoner Brown (six). Who speaks for you, your forelady? Madam Forelady, how say you as to defendant Berry, guilty or not guilty in the manner and form as he stands charged in the indictment?

"The Forelady: We find the defendant Robert John Berry guilty of first degree murder, with recommendations to life imprisonment.

"The Court: Do you wish the jury polled, Mr. McCurrie?

"Mr. McCurrie: Yes, if you please.

"The Court: You will render your own individual verdicts as to the defendant Berry.

"The Clerk: Gladys E. Kahle, how say you individually with reference to defendant Berry?

"The Forelady: Guilty of first degree murder, with recommendations of life imprisonment.

"The Clerk: Robert E. Hill, how say you individually with reference to defendant Berry?

"Juror #2: Guilty of first degree murder, with recommendation for life imprisonment.

"The Clerk: Axel E. Palm, how say you individually with reference to defendant Berry?

"Juror #3: Guilty of first degree murder, with recommendation of life imprisonment.

"The Clerk: Bessie L. McIntyre, how say you individually with reference to defendant Berry?

"Juror #4: Guilty of first degree murder, with recommendations for life imprisonment.

"The Clerk: Jane P. Cottrell, how say you individually with reference to defendant Berry?

"Juror #5: Guilty of first degree murder, recommendation for life imprisonment.

"The Clerk: Clarence R. Martin, how say you individually with reference to defendant Berry?

"Juror #6: Guilty of first degree murder, with recommendations for life.

"The Clerk: Marjorie L. Keilt, how say you individually with reference to defendant Berry?

"Juror #7: Guilty of first degree murder, with recommendation for life imprisonment.

"The Clerk: May Gilmour, how say you individually with reference to defendant Berry?

"Juror #8: Guilty of first degree murder, with recommendation of life imprisonment.

"The Clerk: Thomas J. Callahan, how say you individually with reference to defendant Berry?

"Juror #9: Guilty of first degree murder, with recommendation of life imprisonment.

"The Clerk: George F. Simpson, how say you individually with reference to defendant Berry?

"Juror #10: Guilty of first degree murder, with recommendation for life imprisonment.

"The Clerk: Charles D. Greene, how say you individually with reference to defendant Berry?

"Juror #11: Guilty, with recommendations of life imprisonment.

"The Clerk: John V. Hart, how say you individually with reference to defendant Berry?

"Juror #12: Guilty of murder, with recommendations for life imprisonment.

"The Court: The verdict as rendered by the in-

dividual jurors concerning the defendant Berry may be recorded as rendered.

"The Clerk: Hearken to your verdict as the Court has ordered it recorded. You say you find a unanimous verdict of guilty against defendant Berry of murder in the first degree, with a recommendation for life, and so say you all.

"The Court: The prisoners may be remanded."

The majority opinion of the Court pertaining thereto, stated:

"It should be at once observed that the jury's verdicts as rendered by the forelady in all three cases were in compliance with the provisions of R. S. 2:138-2 (superseded by N. J. S. 2A:113-2) and R. S. 2:138-4 (superseded by N. J. S. 2A:113-4) under which it is imperative that the jury "shall * * * designate by their verdict whether it be murder in the first degree or in the second degree" and that the death sentence shall be exacted "unless the jury shall by its verdict, and as a part thereof, * * * recommend imprisonment at hard labor for life." Thus, but for the fact that the jury was polled in each case, the sentences of death upon Vaszorich and of life imprisonment upon Brown could not have been impugned for any defect in the verdicts as returned by the forelady for the jurors collectively.

The verdicts are asserted to be nullities solely by reason of the failure of Jurors 4, 7 and 11 in the Vaszorich case, and of Jurors 7 to 12, both inclusive, in the Brown case, to specify on the poll of the individual jurors "first degree murder" as the degree of the crime of murder of which each found the respective defendants guilty. * * * The question is solely whether an adequate collective verdict, as rendered by the foreman, is to be vitiated by informal responses of some of the jurors upon the poll."

The majority opinion of the court continued: (four justices).

"It "is a solemn obligation • • • in a matter of the utmost gravity" of the court as well as of the jury to insure that no one be convicted of first degree murder "by intendment or a presumption based upon the evidence" or by "an inference because a juryman fails to dissent" or by "the failure of the accused, at the time of sentence, to question the sufficiency of the verdict", or other than by a verdict "specific", "direct and positive". State v. Cooper, *supra;* State v. Cleveland, *supra;* State v. Johnson, 14 So. 295 (Sup. Ct. La., 1894). In this light must we consider the nature and purpose of a poll of the jury following upon a correct collective verdict.

The right of the accused on trial to request a poll of the jury was given by R. S. 2:190-14 and is now found in Rule 2:7-9 (d). It is not in New Jersey, as it is in some states, a matter lying within the discretion of the trial judge. The purpose of a poll is primarily to determine whether "there is not unanimous concurrence" of the jury in the verdict as rendered by the foreman, Rule 2:7-9 (d). "The practice of long standing requires each juror to answer for himself, thus creating individual responsibility, eliminating any uncertainty as to the verdict announced by the foreman". State v. Cleveland, *supra*, at 322.

The fact of individual concurrence is the objective, State v. Hubbs, 242 S. W. 675 (Sup. Ct., Mo., 1922); otherwise stated, "To ascertain from each juror whether his individual conclusion was correctly expressed by the verdict which the foreman had rendered", Margulies v. State, 137 Atl. 898 (Ct. App. Md. 1927). See also State v. Thursby, 245 S. W. 2d 859 (Sup. Ct. Mo. 1952); Jackson v. State, 41 So. 178 (Sup. Ct. Ala. 1906); Anno., Ann. Cas. 1912 B, 1236; 2 Bishop's New Criminal Procedure (2d ed.), 865, sec. 1003(3). Thus it was held error in State v. Boger, 163 S. E. 877, 878 (Sup. Ct. N. C., 1932) to poll the jury by requesting each juror who voted for the announced verdict to stand, the court remarking:

"The defendant was entitled as a matter of right to know whether each juror assented to the verdict

announced by the juror who undertook to answer for the jury * * *. To poll the jury means to ascertain by questions addressed to the jurors, individually, whether each juror assented, and still assents, to the verdict tendered to the Court."

The required assent of each juror to the correct verdict rendered by the foreman need not be in formal or literal style, provided only that it be unmistakable in meaning. Heinze v. State, *supra,* Margulies v. State, *supra."*

In the same case, referring to the minority opinion (3 justices dissenting) and concurring in the opinion written by Mr. Justice Wachenfeld, it is stated:

The killing was vicious, cruel and bloody and the gruesome details need not be recited further than to say that death was the result of an assault and robbery and under the statute was murder in the first degree.

But the constitutional guarantees of a fair trial are not impaired by the abundance of evidence against the accused, nor is the law to be altered or the trial errors condoned or excused because of evident guilt if in fact they resulted in manifest wrong and injury.

I am in accord with the majority opinion except as to two points. I think there was error in the return of the verdict, which was a nullity for failure to comply with the statute by reciting the degree of murder of which the defendants were convicted, and in the distribution of the so-called "blue book" with the legend set forth therein.

It is not disputed that three of the jurors in the *Vaszorich* case, when polled, upon being asked to declare their verdict, merely responded: "Guilty, with no recommendation," without specifying the degree of murder as required by the statute. As to Brown, six jurors, when polled, replied: "Guilty, with a recommendation of life imprisonment."

The statutory requirement as to the way and manner such verdict must be returned is found in N. J. S. 2A:113-2: "A jury finding a person guilty of murder shall designate by their verdict whether it be murder in the first degree or in the second degree."

This Court, in *State* v. *Cooper*, 2 N. J. 540 (1949), said it was "*imperative* in its command," "it was a *solemn* obligation * * * in a matter of the *utmost gravity.*" "The legislature deemed it essential that in resolving an issue involving the death penalty or life imprisonment the finding be specific and not left to conjecture."

In *State* v. *Cleveland*, 6 N. J. 316 (1951), the unanimous court repeated:

> "The question involves more than a technical violation of a statute or a rule of procedure. The finding must be specific and in *exact accord with the statutory mandate.*"

The same forceful language was used four months ago in *State* v. *Greely*, 11 N. J. 485 (1953):

> "It is the duty of the jury to find a verdict in compliance with the statutory mandate and the *degree of murder of which the defendant is guilty is a specific prerequisite.*"

The majority opinion concedes that under the statute "it is imperative that the jury shall * * * designate by their verdict whether it be murder in the first degree or in the second degree." It admits that on the poll the jurors failed to specify the degree of murder, but with seeming inconsistency then sustains the verdict because the failure of the jurors to specify the degree of murder was due to "momentary inadvertence" and their conduct did not evince a lack of "fixed intent" and concludes that "the inference necessarily suggested by the recommendation

• • • may show individual concurrence in a correct verdict • • •"

In other words, inferences can not be drawn as to what the jurors meant or intended and their failure to comply with the statute is not to be excused because of "inadvertence."

In *State* v. *Cleveland, supra,* however, we said just the opposite:

> "Such determination cannot be left to inference. The finding must be specific and in exact accord with the statutory mandate."

And then to dispel any doubt as to this rule's application in a poll of the jury, we said:

> "We think the law clearly demands that when a jury in a murder case is polled, each juror, if he finds the defendant guilty, shall designate by his verdict whether it be murder in the first degree or in the second degree.
>
> "This was not done in the case under consideration, and we think it constituted prejudicial and therefore reversible error."

It was not new law, for in *State* v. *Cooper, supra,* we said it is "essential that in resolving an issue involving the death penalty or life imprisonment the finding be specific and not left to conjecture."

Then to make "assurance doubly sure," in *State* v. *Greely, supra,* we said compliance with the statutory mandate as to the degree of murder was a "specific prerequisite."

To me the factual situation here is identical. The Constitution is the same; the statute still remains in full force and effect on our books. The only difference is that Cleveland, Cooper and others have been disposed of and Vaszorich and Brown are answering at the bar of justice. The rule as to them is different; it has been changed and Vas-

zorich's death is decreed with little thought to the standards applied by us to others under the same circumstances.

No tribunal, high or low, has the right to take life without strict compliance with the legislative and constitutional mandates permitting it, nor is the judicial reasoning of such substance, quality or stability as to be an adequate substitute for the enacted provisions.

The comforting faith in the equality of the criminal law and its impartial administration may well totter under the impact of the attempted distinction here made. My bewilderment lies in my inability to reconcile the inconsistent treatment and results arrived at under the same law.

The solemnity of the method of taking a verdict in a first-degree murder case as required by the statute has been in existence for 35 years, *State* v. *Turco*, 98 N. J. L. 61 (Sup. Ct. 1922), and has been confirmed by this court on three different occasions within the last few years in strong and unequivocal language; yet the majority sees a difference in the case *sub judice* which I am unable to discern.

In effect, it changes the law, and if a change is to be made, we should at least recognize the right of the legislature to make it instead of usurping its prerogative. Here in substance we now refuse to enforce a legislative directive which we have already upheld and termed a "solemn obligation," "imperative in its command," of the "utmost gravity," and which the courts have supported since its enactment in 1917.

Apparently we do not mean what we said a few months ago no matter how emphatically or plainly we expressed it. In fact, we have just changed our mind and that, it seems, should be sufficient, but Vaszorich is going to have difficulty understanding it.

His treatment is contrary to the standards heretofore unanimously agreed upon and accorded to others. I doubt

if my difficulty is due to my lack of experience in criminal matters. Nevertheless, my analysis of the issues involved, with the pronounced authorities, compels me to conclude that the death warrant here, when issued, must be classified as "expedient" rather than "legal."

In the *De Vita* case, the question, "Was the jury properly polled?" must be answered in the negative. The required assent of each juror to the correct verdict need not be in informal or literal style but it must be unmistakable in meaning. The answer of each juror: "Yes" to the manner and form in which the statement was put does not indicate whether it is or is not the individual juror's verdict. What correct answer could one give to the multiple statement, "you have stopped beating your wife? Answer, yes or no." Similarly stated, the statement, "You have heard the verdict as rendered by your foreman wherein you say defendants Silvo De Vita and Joseph Grillo are guilty of murder in the first degree," and then, "As the roll is called, you will answer by a yes or no answer whether this is your verdict or not." Are the words "or not" surplusage, or do the words "No" and "Not" make for an affirmative and not a negative question, statement or answer? It is claimed that the jurors were improperly polled, that each juror could not properly and unmistakably, in any style or form of their own voluntary choosing answer the propounded statement. To properly poll the jury is to ascertain from each juror, in open court, his individual verdict by the question, "How do you find?" The right to a poll being as sacred as the right to have a jury, the invasion of that right is a restriction and limitation thereof in complete disregard of the constitutional guarantees.

Point 3

A finding of guilty by a jury has no legal consequence unless it is embodied in a proper verdict.

What was the individual finding of each member of the jury? On March 13, 1953 Simon J. Flynn, official court reporter, certified a transcript marked Exhibit S-1 (P. 92 A.), which shows that:

> The jury returns into the court room.
>
> The Clerk: Ladies and Gentlemen of the jury, have you agreed upon a verdict?
>
> The Foreman: We have.
>
> The Clerk: How do you find?
>
> The Foreman: We the jury find defendant Silvio De Vita guilty of murder in the first degree; the defendant Ralph Rosania guilty of murder in the first degree, with a recommendation of life imprisonment; the defendant Joseph Grillo guilty of murder in the first degree.
>
> The Court: The Court of its own motion will direct the clerk to poll the jury on the verdicts of defendants Grillo and De Vita.
>
> The Clerk: Ladies and Gentlemen of the jury, harken to your verdict as the court will have it recorded. You say by your foreman that you find the defendant Silvio De Vita guilty of murder in the first degree. You further say that you find defendant Ralph Rosania guilty of murder in the first degree and recommended life imprisonment. You further say you find defendant Joseph Grillo guilty of murder in the first degree.

It is thus noted that the verdict which we have indicated by (3) and (4) is somewhat different than the verdict which we have indicated by (1) and (2). Are (1) and (2) the proper collective verdicts, or are (3) and (4) the proper collective verdicts? Can one say that (1), (2), (3) and (4) are the individual findings of each member of the jury?

There is a real and substantial controversy as to what was the verdict in the De Vita case.

In re: State v. *Greely,* 11 N. J. 485, speaking for the court, Mr. Justice Wachenfeld stated:

> "The jury has a solemn obligation in a matter of utmost gravity. Its fulfillment cannot be made to rest on bare inference. One cannot be put to death for a homicide unless there has been a verdict by a jury, after trial of the issue in a constitutional mode, establishing in specific terms his guilt of murder in the first degree. This is a pre-emptory statutory direction."

In re: Commonwealth v. *Lemley,* 44 A. (2d) 317, 158 Pa. Super 125, it is stated:

> "Until the verdict is recorded it is of no force, as it is not the legal verdict of a jury.

In re: People v. *Hicks,* 287 N. Y. 165, the court stated:

> "By providing that a jury finding a person guilty of murder in the first degree (in cases of felony murder) may as part of its verdict recommend that the defendant be imprisoned for the term of his natural life, the legislative has plainly said that the jury must determine two matters: first, whether the accused is guilty of the crime charged; second, whether the sentence shall be death or whether the trial judge may pronounce a sentence of life imprisonment. Both questions must be determined by the jury and the jury's answer to both questions must be embodied in its verdict. A juror considering the question of whether an accused is guilty of the crime charged can no longer be influenced consciously or unconsciously by knowledge that the finding of guilt of the crime charged will entail a mandatory penalty, which in his opinion is not justified by the degree of moral guilt of the accused. Each juror should now know that the finding of guilt does not carry that mandatory penalty unless the jury fails to make a recommendation of life imprisonment a part

> of the verdict and each juror should know that he is one of the twelve judges who shall decide what the verdict shall be in all its parts. Until the twelve judges have agreed on every part of the verdict, they have not agreed on any verdict."

In re: Mattice v. *Md. Casualty Co.*, 5 F.(2d) 233, it is stated:

> "There is no verdict of any force but a public verdict given openly in court: until it was received and recorded, it was no verdict, and the jury had a right to alter it as they may a private verdict. The jury could not be legally reconvened after being discharged from the case. It is likewise fundamental that a juror may not impeach his verdict."

To ascertain the individual finding of each member of the jury, it is again necessary to retrace our steps to the "poll" and in doing that, we again arrive at the conclusion as indicated by the record that each juror answered, "Yes" to a multiple statement, as set forth in (2). Had the jury said, as required by the charge of the court:

> We find the defendant Silvio De Vita guilty of murder in the first degree. We find the defendant Ralph Rosania guilty of murder in the first degree with a recommendation of life imprisonment. We find the defendant Joseph Grillo guilty of murder in the first degree,

there would have been an enlightenment as to the verdict. In its present posture, the verdict as indicated by (3), by the art of punctuation takes away the life of Silvio De Vita and gives the life to Ralph Rosania. The semicolon suggests two thoughts. The comma suggests a pause, in one thought. It must be resolved, that the jury intended that their proper verdict be that the recommendation of life imprisonment attach to De Vita and Rosania.

Further, the statment by the clerk to the jury, as indicated by (2),

> "The Clerk: Ladies and Gentlemen of the jury, harken to your verdict as the court will have it recorded. You say by your foreman that you find defendant De Vita guilty of murder in the first degree. You further say you find defendant Ralph Rosania guilty of murder in the first degree and recommend life imprisonment. You further say you find defendant Joseph Grillo guilty of murder in the first degree,"

and the individual members of the jury failing to dissent thereto or remaining silent, in no wise serves the equivalent of a full finding required by the statute, nor does it create an inference that De Vita should be executed. This was clearly set forth in *State* v. *Cooper,* and *State* v. *Cleveland, supra,*

> "A finding of circumstances constituting murder of the first degree is not to be annexed by intendment or presumption based upon the evidence."

There was no individual finding by each member of the jury, as required on the "poll" under the rules.

POINT 4

The pronouncement of a death sentence upon such a verdict or verdicts is unwarranted and an invasion of the constitutional rights, privileges and liberties of De Vita.

Did the court exceed its jurisdictional capacity to impose a death penalty?

R. S. 2: 138-4, (now 2A: 113-4) provides:

> Every person convicted of murder in the first degree * * * shall suffer death unless the jury shall by its verdict, and as part thereof, upon and after the consideration of all the evidence, recommend life imprison-

ment, in which case this and no greater punishment shall be imposed * *

In the De Vita case, the court by its warrant of commitment directed the keeper to inflict the punishment of death upon De Vita. The words, "With a recommendation of life imprisonment", contained in the verdict, being intended for De Vita, the court exceeded its jurisdictional capacity to impose a death penalty and the warrant of commitment is void. To determine the question involved and stated as No. 4 in the Statement of Questions Involved, a determination must first be made in the preceding questions: the opinion within holds, as did Mr. Justice Kalisch and Mr. Justice Campbell in *State* v. *Merra,* that the jury intended life for De Vita and Rosania.

"Doubt must be resolved in favor of life."

POINT 5

No one should go to his death under an unlawful sentence for failure to raise a point or resort to appellate procedure. The writ of habeas corpus is never too late to save a forfeiture.

The natural life cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their authority. The public has an interest in the life and liberty of the accused. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure to object to unauthorized methods. Re: 1 Black, Comm. 133.

In re: *Hill, Warden* v. *U. S. ex rel, Wampler,* 298 U. S. 460, Mr. Justice Cardozo stated:

"A warrant of commitment departing in matter of substance from the judgment back of it is void. Being void and not merely irregular, its nullity may be established upon a writ of habeas corpus. The prisoner is detained not by virtue of the warrant of commitment but on account of the judgment and sentence. As the judgment and sentence do not authorize his detention no *"mittimus"* will avail and make detention lawful. The writ of habeas corpus searches the record back of the commitment. It lays a duty on the court to explore the foundations."

Mr. Justice Douglas of the United States Supreme Court recently stated:

"No man or woman should go to death under an unlawful sentence merely because his lawyer failed to raise the point. It is that function among others that the great writ serves. I adhere to the views stated by Chief Justice Hughes for an unanimous court in Bowen v. Johnston, 306 U. S. 19, 26-27,

"It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired: *ex parte* Lange, *supra,* The rule requiring resort to Appellate procedure when the trial court has determined its own jurisdiction of an offense is not a rule denying the power to issue a writ of habeas corpus when it appears that nevertheless the trial court was without jurisdiction. The rule is not one defining power, but one which relates to the appropriate exercise of power."

In re: Voigt v. *Webb,* 47 F. Supp. 743, it was stated,

"Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty. The conviction and sentence were void for want of the essential elements of due process and

the proceedings thus vitiated could be challenged in any appropriate manner."

In re: Bonner, 151 U. S. 242, on p. 256, Mr. Justice Field said:

> "In all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction and to try the case and to render judgment. It cannot pass beyond those limits in any essential requirements in either stage of these proceedings; and its authority in those particulars is not to be enlarged by any mere inferences from the law or doubtful construction of its terms * * * when the jury has rendered their verdict, the court has pronounced the proper judgment upon such verdict. To deny the writ of habeas corpus in such a case is a virtual suspension of it; and it should be constantly borne in mind that the writ was intended as a protection of the citizen from the encroachment upon his liberty from any source."

In re: Johnson v. *Zerbst, Warden,* 304 U. S. 458, Mr. Justice Black stated:

> "True, habeas corpus cannot be used as a means of reviewing errors of law and irregularities—not involving the question of jurisdiction—occurring during the course of trial. These principles, however, must be construed and applied so as to preserve—not destroy—constitutional safeguards of human life and liberty. The scope of inquiry in habeas corpus proceedings has been broadened, not narrowed * * * in such a proceeding, it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the trial court, and the petitioned court has power to inquire with regard to the jurisdiction of the inferior court either in respect to the subject matter or the person, even if such inquiry involves an examination of facts, outside of, but not inconsistent with the record."

In re: Belt, 159 U. S. 95, it was stated:

> "Ordinarily, the writ will not lie where there is a remedy by writ of error or appeal; but in rare and exceptional cases, it may be issued although such remedy exists."

In re: Ex parte Scridlow, 124 N.J.L. 342, Mr. Chief Justice Brogan stated:

> "Habeas corpus is, of course, available to persons unlawfully committed or detained when the judgment by virtue of which they were committed and are detained is void because of want of power or jurisdiction of the court that pronounced it. That is the law, notwithstanding the provisions of the statute, because that statute which closed the door of habeas corpus to those committed or detained by virtue of a final judgment does not, of course, contemplate final judgments that are void, but only those of a "competent tribunal of civil or criminal jurisdiction * * * 2:82-13(b) (now 2A:67-14(b))."

Re: State v. *Cynkowski,* 19 N. J. Super 243, it was held:

> "A delay of 10 years does not preclude the writ;"

and *in re: N. J.* v. *Lenkowski,* 24 N. J. Super 445, it was held:

> "A hearing is not to be denied an applicant because the outcry comes too late. The writ is essentially a writ of inquiry;"

and *in re:* Hodge, 24 N. J. Super 564, it was held:

> "There is no limitation of time within which an application for a writ must be sought;" and in the most recent case of *State* v. *Fontano,* 26 N. J. Super 166, it was stated:
>
> "No one who sincerely believes in the preservation of personal liberty and the right of a prisoner to initiate a judicial inquiry concerning the legality of the incarceration would criticize the liberal policy of our

> courts in perpetrating the historic availability of the writ of habeas corpus * * * A prisoner is not limited to but one opportunity to gain his freedom. * * * If the supplementary ground as alleged appears to be meritorious he should not be denied the writ merely because of a prior unsuccessful application."

And *in re: State* v. *Court of Common Pleas,* 1 N. J. 14, it was stated:

> "The writ of habeas corpus provides summary relief against the impairment of the fundamental right. It is an aid to enforce the immemorial right of personal liberty. The office of the writ is to bring before the court for inspection the record of the proceedings to determine whether the trial court had jurisdiction and had proceeded according to law."

R.S.2A:67-1, referring to habeas corpus, states:

> "This chapter shall be liberally construed so as to secure, as far as possible, the liberty of the citizen";

and R.S.2A:67-36 states:

> "An appeal from the determination may be had to the Appellate Division."

The limited rule 2:7-13, now Rule 3:7-15(a)(b)(c) allows a prisoner in custody claiming the imposition of an illegal sentence to apply for correction to the court imposing the sentence; and provides for issuance of writ of habeas corpus upon grounds which would not furnish a basis for relief under (a) and an appeal from the determination of such application.

The claimed error is a denial of the basic right of trial by jury, which may or may not be cured proceeding under Rule 3:17-15(a), but should be corrected under Rule 3:17-15 (a) and (b).

The cases and rules set forth in Point 5 are referred to solely for the reason that the state appeared to dispute the

right of De Vita to initiate habeas corpus proceedings and seemed to suggest that the proper method under the rule is to correct the sentence if it were illegal and that there was delay in the proceedings. The state argues that the most favorable action which De Vita may anticipate is that of re-sentence. That is not so. If homicide were bailable (Rule 2:9-1(a), which it is not, then De Vita would be entitled to release on bail pending a proper trial.) If the sentence were excessive, a re-sentence could reduce the term. The sentence being void, the warrant upon which the judgment and sentence is based is void and De Vita is entitled to a release from commitment except for the nature of his offense which denies to him bail. An illegal sentence presupposes a minimum or maximum or more than one sentence; which sentences are divisible. A sentence of death is indivisible. The sentence is not erroneous. It is not excessive. It is void. The warrant intends to exact the extreme penalty. Re: *Adams* v. *McCorkle*, 76 N.J.L.J. 274.

The remedy for relief is that pursued by De Vita, proceeding under R. S.2A :67-1 (habeas corpus).

Re these cases:

Eisentrager v. *Forrestal*, 174 F. (2d) 961, 70 S. Ct. 158, 338 U.S. 877;

Leonard v. *Hudspeth*, 112 F. (2d) 121;

Sinclair v. *Hiatt*, 86 F. Supp. 828;

Scott v. *Aderhold*, 116 F. (2d) 797;

U. S. ex rel Judd v. *Ragen*, 167 F. (2d) 802;

U. S. ex rel Montgomery v. *Ragen*, 86 F. Supp. 382;

Williams v. *Kaiser*, 65 S. Ct. 363, 323 U. S. 471, 89 L. Ed. 398;

Wright v. *Johnston*, 77 F. Supp. 687, amended 8 F.R.D. 358.

Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing said decision.

HARRY KAY,
Counsel for Petitioner.

APPENDIX "A"

Pertinent Sections of the Constitution of the State of New Jersey

Constitution of New Jersey, 1947, Article I

Article I

1. All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

10. In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense.

2A:113-2. Degrees of murder; designation in verdict. Murder which is perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which is committed in perpetrating or attempting to perpetrate arson, burglary, kidnapping, rape, robbery or sodomy, is murder in the first degree. Any other kind of murder is murder in the second degree. A jury finding a person guilty of murder shall designate by their verdict whether it be murder in the first degree or in the second degree.

2A:113-3. Murder; plea of guilty not to be received; plea of non vult or nolo contendere and sentence thereon, in no case shall the plead of guilty be received upon any indictment for murder, and if, upon arraignment, such plea is offered, it shall be disregarded, and the plea of not guilty entered, and a jury, duly impaneled, shall try the case.

Nothing herein contained shall prevent the accused from pleading non vult or nolo contendere to the indictment; the sentence to be imposed, if such plea be accepted, shall be either imprisonment for life or the same as that imposed upon a conviction of murder in the second degree.

Nothing herein contained shall prevent the accused from

pleading non vult or nolo contendere to the indictment; the sentence to be imposed, if such plea be accepted, shall be either imprisonment for life or the same as that imposed upon a conviction of murder in the second degree.

2A:113-4. Murder; punishment. Every person convicted of murder in the first degree, his aiders, abettors, counselors and procurers, shall suffer death unless the jury shall by its verdict, and as a part thereof, upon and after the consideration of all the evidence, recommend life imprisonment, in which case this and no greater punishment shall be imposed. Every person convicted of murder in the second degree shall suffer imprisonment for not more than 30 years.

2:52(a), (b). Pleas.

(a) A defendant may plead not guilty, guilty, non vult or nolo contendere, excepting, however, that no defendant can plead guilty to murder save as provided by law. The court may refuse to accept a plea of guilty, non vult or nolo contendere, and shall not accept such plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead of if the court refuses to accept a plea of guilty the court shall enter a plea of not guilty.

(b) If a defendant, upon arraignment, shall stand mute, the court shall direct that a plea of not guilty be entered for him.

2:7-9(a), (d). Verdict.

(a) Return. The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.

(d) Poll of the jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If, upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

3:7-15. (formerly 1:2-30(a))

(a) Where a prisoner is in custody under sentence of a criminal court and claims that the sentence imposed was

illegal, he shall apply for correction of the sentence to the court which imposed the same. An appeal from the determination of such application may be taken in the same manner as from other final judgments.

(b) Where a prisoner is in custody under sentence of a criminal court and desires to apply for a writ of habeas corpus upon grounds which would not furnish a basis for relief under paragraph (a) hereof, he shall apply to the Assignment Judge, in the county where the sentence was imposed. The Assignment Judge may refer the application to any Superior Court or county court judge sitting in the county, whenever practicable such reference to be made to the judge who presided at the trial. An appeal from the determination of such application may be taken in the same manner as from other final judgments.

(c) Where any such application is made to a court other than that provided for in paragraphs (a) or (b) hereof, the court shall order the proceedings transferred to the proper court for disposition.

APPENDIX "B"

EXCERPTS FROM TRIAL COURT RECORD

EXHIBIT P-1

1720

(The jury returns to the courtroom.)

The Clerk: Ladies and Gentlemen, have you agreed upon a verdict?

The Foreman: We have.

The Clerk: Mr. Foreman, how do you find?

The Foreman: We, the jury, find the defendant Silvio De Vita guilty of murder in the first degree, the defendant Ralph Rosania guilty of murder in the first degree with a recommendation of life imprisonment, the defendant Joseph Grillo guilty of murder in the first degree.

The Court: The Court of its own motion will direct the

clerk to poll the jury on the verdicts of the defendants Grillo and De Vita.

(The Clerk polls the jury, and the verdict is affirmed.)

The Court: The defendants may be remanded until March 12 for sentence. That date will be tentative, depending on the probation office being ready.

EXHIBIT P-1,
7/8/53,
G. A. FLAMMER.

CERTIFICATE OF OFFICIAL COURT REPORTERS, ESSEX COUNTY COURT, NEWARK, NEW JERSEY

THE STATE OF NEW JERSEY,

vs.

SILVIO DE VITA, RALPH ROSANIA AND JOSEPH GRILLO.

We, Saul H. Kirschenbaum, Simon J. Flynn, Charles E. Abbey and George A. Flammer, Official Court Reporters, certify the foregoing transcript of proceedings in this cause.

March 8, 1952.

SAUL H. KIRSCHENBAUM,
SIMON J. FLYNN,
CHARLES E. ABBEY,
GEORGE A. FLAMMER.

EXHIBIT P-2

By order of the Court the jury is to be polled.

You have heard the verdict as rendered by your foreman, wherein you say the defendants Silvio De Vita and Joseph Grillo are guilty of murder in the first degree. As the roll is called, you will answer by a yes or no answer whether this is your verdict or not.

Vito R. George.
Mr. George: Yes.
The Clerk: Earl C. Gieser.
Mr. Gieser: Yes.

The Clerk: George Hobby.
Mr. Hobby: Yes.
The Clerk: Ethel M. Grassle.
Miss Grassle: Yes.
The Clerk: Arthur Kuhnle.
Mr. Kuhnle: Yes.
The Clerk: Leonard L. Harmon.
Mr. Harmon: Yes.
The Clerk: Ralph M. Johnston, Jr.
Mr. Johnston: Yes.
The Clerk: Martha Garrabrant.
Mrs. Garrabrant: Yes.
The Clerk: Gerard Holzel.
Mr. Holzel: Yes.
The Clerk: Harold Leslie.
Mr. Leslie: Yes.
The Clerk: James A. Little.
Mr. Little: Yes.
The Clerk: William C. Gardner.
Mr. Gardner: Yes.

The Court: The defendants may be remanded until March 12 for sentence. That date will be tentative, depending on the Probation Office being ready.

I, Simon J. Flynn Official Court Reporter hereby certify the foregoing transcript.

March 13, 1953.

SIMON J. FLYNN.

EXHIBIT S-1

(The jury returns into the court room.)

The Clerk: Ladies and gentlemen of the jury, have you agreed upon a verdict?
The Foreman: We have.
The Clerk: How do you find?
The Foreman: We the jury find the defendant Silvio De Vita guilty of murder in the first degree; the defendant

Ralph Rosania guilty of murder in the first degree, with a recommendation of life imprisonment; the defendant Joseph Grillo guilty of murder in the first degree.

The Court: The Court of its own motion will direct the clerk to poll the jury on the verdicts of the defendants Grillo and De Vita.

The Clerk: Ladies and Gentlemen of the jury, harken to your verdict as the Court will have it recorded. You say by your foreman that you find the defendant Silvio De Vita guilty of murder in the first degree. You further say that you find the defendant Ralph Rosania guilty of murder in the first degree and recommend life imprisonment. You further say you find the defendant Joseph Grillo guilty of murder in the first degree.

INDICTMENT No. 684

(Filed November 11, 1951.)

Essex County, to wit:

The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that Silvio DeVita, Ralph Rosania, and Joseph Grillo, on the 9th day of November, 1951, at the City of Newark in the County of Essex aforesaid and within the jurisdiction of this Court, did wilfully, feloniously and of their malice aforethought, kill and murder James Law, against the peace of this State, the government and dignity of the same.

(S.) RICHARD J. CONGLETON,
County Prosecutor.